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Via Regulations.gov Portal

Water Docket
U.S. Environmental Protection Agency
EPA West, Room 3334
1301 Constitution Ave., NW
Washington, DC 20004

Re: Comments of the American Petroleum Institute on the Environmental Protection Agency's "Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation;" EPA-HQ-OW-2020-0008.

Dear Sir/Madam:

This letter provides comments from the American Petroleum Institute ("API") in response to the Environmental Protection Agency's ("EPA's" or "The Agency's") request for comment on whether EPA's approval of a state or tribe's Clean Water Act ("CWA" or "the Act") Section 404 program is non-discretionary for purposes of Endangered Species Act ("ESA") Section 7 consultation.[1] API appreciates the Agency's solicitation of stakeholder comments on this important issue. As further explained in the detailed comments that follow, while API supports efforts to increase state and tribal assumption of permitting responsibility under Section 404 of the CWA, we do not agree with the Florida Department of Environmental Protection's ("FDEP's") suggestion that EPA's approval of a state or tribal application for assumption of the CWA Section 404 permitting program is a matter of agency discretion triggering the need for the Agency to engage in consultation under ESA Section 7.

API is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly eight percent of the U.S. economy. API's more than 600 member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline and marine businesses, and service and supply firms. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability. API and its members are committed to the safe transportation of natural gas,

[1] 85 Fed. Reg. 30,953 (May 21, 2020).

crude oil and petroleum products, and support sound science- and risk-based regulations, legislation, and industry practices that have demonstrated safety benefits. API members engage in exploration, production, and construction projects that routinely involve both state and federal water permitting, including permits issued under CWA Section 404 for various activities that can result in the discharge of dredged or fill material in navigable waters.

In all but two states (New Jersey and Michigan), the only entity that can issue permits for those activities is the U.S. Army Corps of Engineers ("Army Corps"). This near exclusive reliance on the Army Corps for issuing Section 404 permits is at odds with the framework Congress intended, and Congress's intent in this respect is perfectly clear. It identified state primacy in Section 404 permitting as among the foremost policy objectives of the CWA, and it structured Section 404 to make clear that EPA's approval of a state or tribal assumption application was mandatory. As such, while API supports FDEP's efforts to assume Section 404 authority and further Congress's overall policy objectives, we do not believe this overall policy objective can or should be achieved without following Congress's equally clear instruction that EPA has a mandatory duty to timely transfer Section 404 permitting authority once a state or tribe submits an application that satisfies the criteria Congress specified.

Although EPA must necessarily exercise some degree of judgement in weighing an application against the statutory criteria, such use of judgement does not mean that the approval of a state or tribal Section 404 program is a matter committed to agency discretion – "Discretion and judgment are not the same thing."[2] The U.S. Supreme Court has already determined that EPA's approval of CWA permitting authority to a state or tribe is not discretionary.[3] While this case involved a transfer of authority under CWA Section 402, Congress's use of nearly identical language in Sections 402 and 404 precludes EPA from adopting the interpretation that FDEP urges.

Because the Agency's role under Section 404 is nondiscretionary, EPA has no obligation to consult under ESA Section 7. The Supreme Court was perfectly clear in this respect as well. Section 7 consultation is not required unless "there is discretionary Federal involvement or control."[4]

API acknowledges the validity of FDEP's concern about the potential for liability under the ESA if an activity authorized under a state-issued Section 404 permit results in the take of a listed species. However, we do not believe that attempting to construct a Section 7 consultation obligation where none is required is a lawful or appropriate way of obtaining protection from this incidental take liability. Congress crafted ESA Section 10 to provide the incidental take liability protection that FDEP desires. API recognizes that the process for obtaining an Incidental Take Permit ("ITP") from the U.S. Fish and Wildlife Service ("FWS") can be long and costly, but the burdens of that process do not allow EPA to in any way alter the role Section 404 prescribed for the Agency in approving the transfer of permitting authority to states and tribes.

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[2] *Nat'l Wildlife Fed. v. Dep't of Trans*, Slip Op. at Nos. 19-1609/1610 (6th Cir. June 5, 2020).
[3] *National Ass'n of Home Builders v. Defenders of Wildlife ("NAHB")*, 551 US 664 (2007).
[4] *NAHB*, 551 US 664 (2007).

I. COOPERATIVE FEDERALISM AND STATE/TRIBAL ASSUMPTION OF PERMITTING AUTHORITY UNDER CWA SECTION 404

Grounded on principles of cooperative federalism, the CWA establishes the primacy of states in fulfilling the Act's goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters:"[5]

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.[6]

As relevant here, Congress preserved the important role of states not only generally, but specifically with respect to Section 404:

> It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act.[7]

Thus, the cornerstone of the CWA's cooperative federalism framework is the ability of states and tribes to apply for and assume permitting and enforcement authority over the Act's key regulatory programs—the CWA Section 402 National Pollutant Discharge Elimination System ("NPDES") permitting program for point source discharges and the CWA Section 404 permitting program for the discharge of dredged or fill material.

To give practical effect to Congress's goal that states and tribes implement the Section 402 and Section 404 permitting programs, the nearly identical state assumption procedures that Congress prescribed for these programs impose on EPA a nondiscretionary obligation to timely transfer permitting authority once certain enumerated criteria were met.[8] Although Congress varied the enumerated criteria for these programs to a modest degree, nearly all of the criteria are identical.[9] In those few areas where the enumerated criteria differ, it is to account for differences between the types of discharges permitted under those programs (*i.e.*, point sources under Section 402 and dredged and fill material under Section 404). Perhaps most importantly, each of the enumerated criteria that Congress specified under both programs focuses on whether the state or tribe has legal *authority* to implement specific aspects of the permitting program. None of the criteria can be construed as a factor that Congress believed EPA should weigh in considering whether or not to transfer permitting authority to a state or tribe. ***To the contrary, Congress expressly limited the Agency's role to semi-mechanically checking to confirm that state/tribal laws are in place to implement the necessary parts of the permitting program.*** Consequently, the few differences

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[5] 33 U.S.C. § 1251(a).
[6] 33 U.S.C. § 1251(b).
[7] 33 U.S.C. § 1251(b).
[8] Compare 33 U.S.C. § 1342(b) with 33 U.S.C. § 1344(g).
[9] FDEP relies on the very modest differences between the enumerated criteria for these programs to suggest that the Supreme Court's decision in *NAHB* does not foreclose EPA from interpreting its role under Section 404 as discretionary. As we explain infra, this argument has no merit.

in the criteria specified in the Section 402 and Section 404 programs represent nothing more than Congress's slight variation on the types of legal authority EPA must confirm to exist. These differences do not convert the enumerated criteria to mere factors for EPA to consider in deciding whether or not to transfer permitting authority. EPA's role remains the same under both the Section 402 and Section 404 programs, and that role is limited to checking whether states and tribes have legal authority in the areas Congress specified. Once the Agency confirms that authority exists, it "*shall* approve the program."[10]

While the processes through which states and tribes may apply and be approved to administer the Section 402 and Section 404 permitting programs are nearly identical, actual state[11] use of the delegation provisions in Sections 402 and 404 differs greatly. At present, forty-seven states administer the CWA Section 402 permit program for those "waters of the United States" within their boundaries,[12] and only two states (Michigan and New Jersey) administer the Section 404 permit program for those waters that are assumable by states pursuant to Section 404(g).[13]

There are several reasons for this disparity, including, as noted in the FDEP Whitepaper, reasonable concerns that state or tribal assumption of the Section 404 permitting program may expose states and permit holders to potential liability for incidental take of species listed on the ESA. As discussed further below, API has supported and will continue to support reasonable efforts to decrease the barriers to state and tribal assumption of authority under the Section 404 program and to streamline the approval of new state and tribal applications under Section 404(g). We also share FDEP's concern with the specific obstacle to state assumption posed by the risk of incidental take liability under the ESA, and we agree that steps should be taken to mitigate that risk so states and tribes can more effectively utilize Section 404's assumption provisions. This is consistent with our longstanding support for cooperative federalism and our strong belief that states and tribes are often in the best position to oversee and protect the water resources within their borders.

As we have noted from the outset, however, API cannot support FDEP's proposed means of addressing the risks of incidental take liability that may result from a state's assumption of Section 404 permitting authority. As explained more fully in our forthcoming legal analysis, EPA's approval of a valid and complete state application to assume authority under Section 404 is not a matter committed to agency discretion. Like EPA's review under Section 402, such approvals become mandatory once the state demonstrates that it meets certain criteria enumerated in the CWA. Congress expressly provided these criteria in Sections 402 and 404 and limited EPA's authority to add or change these considerations. Congress did so to protect the Act's state assumption procedures from political whims and to streamline the transfer of permitting authority to states. As such, it is also entirely consistent with our longstanding

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[10] 33 U.S.C. § 1344(h)(2)(a) (emphasis added).

[11] No tribes administer either the Section 402 or 404 programs.

[12] Three States (Massachusetts, New Hampshire, and New Mexico) do not currently administer any part of the CWA Section 402 program.

[13] EPA has worked with over 24 states and tribes over nearly 40 years, but ultimately only two states have successfully assumed permitting authority under Section 404(g). See "Clean Water Section 404(g): What Does it Say? Why Are We Here?," Presentation by Kathy Hurld, EPA at NACEPT meeting of Assumable Waters Subcommittee (Oct. 6, 2015).

commitment to cooperative federalism for API to profoundly disagree with FDEP's suggestion that EPA's transfer of Section 404 authority to a state is a matter of agency discretion.

II. API SUPPORTS THE ADMINISTRATION'S EFFORTS TO FACILITATE COOPERATIVE FEDERALISM UNDER THE CWA AND STREAMLINE STATE ASSUMPTION OF THE SECTION 404 PROGRAM

Consistent with the mandates of the CWA, this Administration has taken several steps to "recognize, preserve, and protect the primary responsibilities and rights of States" in protecting water resources,[14] and API has been pleased to lend its support to many of those efforts. To begin, API and its members have strongly supported this Administration's efforts to promulgate a clear, enduring, and legally sound definition of the "Waters of the United States" ("WOTUS") that are subject to federal jurisdiction under the CWA. Indeed, API and its members embraced every opportunity to provide constructive insight to EPA and the Army Corps on the elements of a clear, administrable, and legally sound construction of the definition of WOTUS under CWA.[15]

Although the development of a clear, lawful, and enduring definition of WOTUS is important for many reasons, as relevant here, a clear and intelligible means of identifying the waters and wetlands under federal jurisdiction is essential to fairly discern those activities that may be subject to permitting requirements under Section 404 of the CWA. The WOTUS definition also serves as the critical starting point for understanding the subset of navigable waters under federal jurisdiction for which states may assume Section 404 permitting authority.

CWA Section 404(g) authorizes states, with approval from EPA, to assume authority to administer the Section 404 program in some, but not all, navigable waters. The waters and wetlands that a state may not assume, and that the Army Corps must retain even after a state has assumed the program, are specified in a parenthetical phrase in Section 404(g)(1) as:

> ... those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto ...[16]

Widespread confusion regarding the subset of "assumable waters" described in this parenthetical has been identified as one of the foremost obstacles to greater state assumption of Section 404 authority and led EPA in 2015 to convene an Assumable Waters Subcommittee under the National Advisory Council for Environmental Policy and Technology ("NACEPT").[17] And unfortunately, this confusion persisted when the minority views of the Army Corps' sole representative on the Assumable Waters Subcommittee prevented the remaining members of the

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[14] 85 Fed. Reg. 22,250 (Apr. 21, 2020).

[15] For instance, API submitted numerous comments on its own, jointly, and/or through multi-industry trade coalitions, including the Waters Advocacy Coalition ("WAC"), the Federal Water Quality Coalition ("FWQC"), and the Federal Stormwater Association ("FSA").

[16] 33 U.S.C. § 1344(g)(1).

[17] See Final Report of NACEPT Assumable Waters Subcommittee (May 2017).

subcommittee from reaching consensus for recommending much needed clarifications to EPA and the Army Corps.[18]

API was therefore pleased to learn in 2018 that, in furtherance of this Administration's focus on cooperative federalism, EPA and the Army Corps were once again prioritizing efforts to clarify and streamline the agencies' approach to state assumption under Section 404(g). In August 2018, the Army Corps announced it would adopt the majority recommendation of the NACEPT Assumable Waters Subcommittee in identifying the waters over which the Corps would retain authority, should a state or tribe assume Section 404 permitting authority.[19]

API supports the Army Corps' decision to provide this important guidance regarding the subset of navigable waters over which states and tribes could assume permitting authority through the Section 404(g) assumption process. Providing states and tribes a more concrete understanding of the waters over which they may assume permitting authority under Section 404 is critical, because it allows states and tribes to develop the statutory authorities and evaluate administrative resources necessary to ensure their full and effective oversight over dredge and fill operations.

For similar reasons, API also supports EPA's efforts to engage states, tribes, and other stakeholders in a dialogue about additional ways to refine and clarify those waters over which states and tribes may assume permitting authority, and those waters that must remain within the jurisdiction of the Army Corps.[20] We are also looking forward to reviewing EPA's anticipated clarifications and updates to its 1988 regulations on state and tribal assumption of permitting under Section 404(g),[21] and we encourage the Agency to propose those clarifications without delay.[22]

III. API DISAGREES WITH THE APPROACH DESCRIBED IN THE FDEP WHITEPAPER

Although API would like more states to assume permitting authority under Section 404 and is specifically supportive of Florida's efforts in this respect, we cannot support the approach described in the FDEP Whitepaper. API understands FDEP's concerns regarding incidental take liability and recognizes that these concerns are significantly heightened in a state like Florida, which has a large number of listed species in its state waters. We do not, however, agree that these concerns (or any other concerns) can justify EPA's adoption of a legally dubious interpretation of CWA Section 404(g). Nor can they replace EPA's binding obligation to transfer Section 404 authority to eligible state and tribal applicants with broad and undefined Agency discretion to determine when to transfer such authority, and under what terms. EPA's

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[18] See Final Report of NACEPT Assumable Waters Subcommittee (May 2017).

[19] See Memorandum from R.D. James, Assistant Secretary of the Army to Commanding General, U.S. Army Corps of Engineers titled "Clean Water Act 404(g) – Non-Assumable Waters" (Jul. 30, 2018).

[20] https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404 (last visited June 23, 2020).

[21] See EPA Regulatory Agenda entry for RIN 2040-AF83 estimating that publication of a notice of proposed rulemaking by April 2020.

[22] In addition to noting our overall support for cooperative federalism and expanding the role of states and tribes in CWA permitting, including the Section 404 dredge and fill permitting program, API wishes to also note our specific support for FDEP's efforts to pursue assumption of the 404 program.

longstanding position is the correct one – EPA has a limited and nondiscretionary role under CWA Section 404(g) that makes Section 7 consultation unnecessary and impermissible.

a. EPA is Not Required to Consult under ESA Section 7 Before Approving a State's Section 404 Assumption Application

API's view that EPA is not required to engage in Section 7 consultation before approving an eligible state or tribe's Section 404 assumption application rests on two clear and unambiguous statutory interpretations: (1) that nondiscretionary actions of federal agencies do not require the agencies to first consult with the Services under ESA Section 7; and (2) that EPA has no discretion to deny approval of an eligible state or tribe's Section 404 assumption application. We discuss both of these elements below.

1. Section 7 is not Triggered for Nondiscretionary Agency Actions

Section 7 of the ESA requires that federal agencies consult with the Services to ensure that any projects they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of critical habitat of such species.[23]

At its base, Section 7 was intended to obtain advance understanding of the potential effects of agency actions—and to use that understanding to better inform agency decisions, including decisions to mitigate or eliminate impacts. Implicit within Section 7's goals and requirements is the expectation that there are actions and decisions within the control and purview of the agencies that would allow those agencies to avoid creating or mitigating the effects of their actions.

In many instances, agencies have such discretion and control. This is the case when a statutory provision confers to an agency broad authority to take any one of a number of actions in order to further some statutorily prescribed goal or outcome. Equipped with this broad discretion, an agency may be able to consider the potential impacts of its action on listed species, and amend or withhold that action to eliminate or mitigate those potential impacts.

Other times, however, a statute expressly limits the factors that an agency may consider and mandates the agency take a certain action automatically upon the occurrence of an event or finding. In an instance when Congress has excluded endangered species impacts from an enumerated list of factors that an agency may consider when making a decision, the agency has no discretion to alter the list of statutory factors to include those ESA considerations. And similarly, when Congress directs that an agency "shall" take an action once the agency determines that certain enumerated factors have been met, the agency may not alter or withhold that statutorily mandated action regardless of the agency's views of the potential impact of the action on listed species.

In these instances, Congress effectively wields the discretion and makes the decision that is reflected in the agency action. The agency's role is nondiscretionary and essentially mechanical, and because the agency action is statutorily compelled, the agency need not consider under Section 7 alternatives it has no statutory authority to promulgate. Absent some agency ability to

[23] 16 U.S.C. 1536(b).

alter its actions to avoid or measurably reduce potential impacts on listed species, there is no benefit or purpose to Section 7 consultation. Stated differently, if the potential risk to species or habitat effectively remains the same irrespective of the agency action, then a protracted analysis of the agency action provides nothing more than an empty bureaucratic exercise.

This reasonable premise is already embodied in the Services' longstanding regulations requiring consultation only when "there is discretionary Federal involvement or control." This premise is also supported by the Supreme Court's holding in *NAHB,* which limited Section 7 consultations to situations where "there is discretionary Federal involvement or control."[24] As the Supreme Court noted in that case:

> We conclude that this interpretation is reasonable in light of the statute's text and the overall statutory scheme, and that it is therefore entitled to deference under Chevron. Section 7(a)(2) requires that an agency 'insure' that the actions it authorizes, funds, or carries out are not likely to jeopardize listed species or their habitats. To 'insure' something . . . means '[t]o make certain, to secure, to guarantee (some thing, event, *etc.*).' The regulation's focus on 'discretionary' actions accords with the commonsense conclusion that, when an agency is required to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species.[25]

This reasoning is further supported by the Supreme Court's decision in *Department of Transportation v. Public Citizen*.[26] That case concerned safety regulations that were promulgated by the Federal Motor Carrier Safety Administration ("FMCSA") and had the effect of triggering a Presidential directive allowing Mexican trucks to ply their trade on United States roads. The Court held that the National Environmental Policy Act ("NEPA") did not require the agency to assess the environmental effects of allowing the trucks entry because:

> the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion.[27]

The Court thus concluded that, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[28]

2. Approval of an Eligible State or Tribe's Section 404 Assumption Application is Nondiscretionary

Notably, the Supreme Court's holding on the inapplicability of Section 7 consultation to nondiscretionary agency action in the *NAHB* case cited above was rendered in the context of EPA's approval of an eligible state's application to assume permitting authority under the CWA Section 402 NPDES program. Thus, this holding not only prohibits the application of ESA Section 7(b) to nondiscretionary agency actions, it specifically identifies EPA's approval of an

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[24] *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 US 664 (2007).
[25] *Id.* Internal citations omitted.
[26] 541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004).
[27] *Id.*, at 769, 124 S.Ct. 2204 (emphasis in original).
[28] *Id.*, at 770, 124 S.Ct. 2204.

eligible state and tribe's assumption application under CWA Section 402 as a nondiscretionary action. As such, given the nearly identical structure, format, and requirements of CWA Sections 402 and 404, there is no need for a weighty legal analysis or creative extrapolation to understand that the Supreme Court decision in *NAHB* also binds the Agency with respect to CWA Section 404(g). The Supreme Court's decision in *NAHB* is controlling, and it prohibits EPA from adopting the approach outlined in the FDEP Whitepaper.

The Supreme Court's decision in *NAHB* rested on a provision of CWA Section 402 instructing that EPA "shall" transfer NPDES permitting authority to a state or tribe if nine enumerated criteria were met.[29] After examining this language, the Court held that the action was not "discretionary" because "the statutory language [was] mandatory and the list exclusive."[30] The statute did "not just set forth minimum requirements for the transfer of permitting authority; it affirmatively mandate[d] that the transfer 'shall' be approved if the specified criteria are met."[31] As such, the criteria "operate[d] as a ceiling as well as a floor."[32] In short, the Supreme Court viewed EPA's transfer of Section 402 permitting authority to Arizona as nondiscretionary because it was an action that the Agency was "required by statute" to do "once certain specified triggering events ha[d] occurred."[33]

There are no material differences between the Section 402 transfer provisions examined by the Supreme Court in *NAHB* and the transfer provisions in Section 404. Section 404 directs that, upon receipt of a Section 404 program from a state, once EPA "determines that such State . . . has the authority set forth in paragraph (1) of this subsection, the Administrator *shall approve* the program . . ."[34] The enumerated criteria in Section 404 are nearly identical to, and no less exclusive than, the criteria enumerated in Section 402.[35] Accordingly, like the Section 402 program at issue in *NAHB*, Section 404's "statutory language is mandatory,"[36] and its "exclusive" list of criteria "operates as a ceiling as well as a floor."[37] The Supreme Court's holding in *NAHB* therefore compels an interpretation that, under Sections 402 and 404 alike, is "required by statute" to approve the transfer of permitting authority once the enumerated "triggering events have occurred."[38]

Contrary to the arguments advanced in the FDEP Whitepaper, there is no basis to construe the *NAHB* decision as narrowly applicable to the Section 402 program. Just last month, the U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit") relied on the analytical framework in *NAHB* to hold that EPA's obligation to approve oil spill response plans under CWA Section 311 becomes mandatory once the "triggering events have occurred."[39] EPA's longstanding interpretation of the NAHB decision remains correct: "Like §402(b), §404(h)(2)(A) requires

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[29] 33 U.S.C. § 1342(b); *NAHB*, 551 U.S. at 650-51.
[30] *NAHB*, 551 U.S. at 661.
[31] *NAHB*, 551 U.S. at 663.
[32] *NAHB*, 551 U.S. at 663.
[33] *NAHB*, 551 U.S. at 663.
[34] 33 U.S.C. § 1344(h)(2)(a) (emphasis added).
[35] 33 U.S.C. § 1344(h)(1).
[36] *NAHB*, 551 U.S. at 661.
[37] *NAHB*, 551 U.S. at 663.
[38] *NAHB* at 669.
[39] *See Nat'l Wildlife Fed. v. Dep't of Trans*, Slip Op. at Nos. 19-1609/1610 (6th Cir. June 5, 2020).

EPA to 'approve' the state's application to transfer the permitting program if the state has the requisite authority. Under §404(h), EPA is only permitted to evaluate the specified criteria and does not have discretion to add to the list."[40]

3. The FDEP Whitepaper's Attempt to Distinguish Section 404 for Purposes of Appling the *NAHB* Holding is Deeply Flawed

The FDEP Whitepaper advances two principal arguments that attempt to distinguish the Section 404 program from the Section 402 program in the hope that it will allow EPA to treat its approval obligation under Section 404 as discretionary, without creating a conflict with the Supreme Court's *NAHB* decision. Neither of these arguments identify meaningful distinctions between the Section 402 and Section 404 programs, and EPA cannot lawfully rely on them to avoid the Supreme Court's holding in *NAHB*.

The first distinction that FDEP deems sufficient to sever the applicability of NAHB is found in Sections 404(g)(2) and (3), which direct EPA, upon receipt of a state or tribal request to assume the Section 404 program, to provide "the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service" an opportunity to comment on the application for assumption. Relatedly, CWA Section 404(h)(1) then requires EPA, in rendering its determination, to "tak[e] into account any comments submitted by . . . the Secretary of the Interior, acting through the Director of [FWS]" under CWA section 404(g). FDEP reads these provisions together to conclude that Section 404(g) requires EPA to receive and consider input specifically focused on the protection of threatened and endangered species, and to further conclude that the Agency's obligation to receive and consider this information means that EPA has the discretion to approve or disapprove a request to assume Section 404 authority based on potential impacts to listed species. These erroneous conclusions provide no credible basis to treat EPA's approvals under Section 404 as discretionary and therefore no basis to distinguish Section 404 from the Supreme Court's holding in *NAHB*.

To begin, as explained in Section I of these comments, the enumerated criteria in Sections 402 and 404 represent required inquiries into whether the state or tribe has legal authority over certain issues. These criteria are not factors that transform EPA's mandatory approvals into matters committed to Agency discretion. Section 404's requirement that EPA solicit and consider comments from FWS merely reflects that FWS, as the agency charged with implanting federal wildlife laws, is in a better position to review the applicants' authority under state or tribal wildlife laws than EPA, which does not implement the ESA or other federal wildlife laws. These provisions do not expand EPA's narrow role in merely determining whether the state/tribe has the requisite legal authority, it just instructs EPA to solicit the Service's expertise in making that determination. As was the case in *NAHB*, these enumerated inquiries into the state or tribe's legal authority continue to "operate as a ceiling as well as a floor."[41]

Moreover, to the extent FDEP argues that this requirement to solicit comments from FWS reflects an obligation to consult with FWS under ESA Section 7, that analysis is unquestionably wrong-headed. Congress was well aware that it wrote and enacted ESA Section 7 when it

[40] See EPA's December 27, 2010 letter to ECOS and ASWM (Docket ID No. EPA-HQ-OW-2020-0008).
[41] *NAHB*, 551 U.S. at 663.

drafted this aspect of CWA Section 404, and therefore when it wrote Section 404 to require EPA to interact with FWS in a manner wholly distinct that what ESA Section 7 requires, it can only be because Congress intended this provision of Section 404 to be wholly distinct from Section 7 consultation. Indeed, Congress's precise prescription of the narrow and specific manner in which EPA must engage with FWS under Section 404 reflects that Congress understood that the mandatory nature of EPA's role under Section 404 meant that the Agency would not otherwise gather FWS's insights during Section 7 consultation.

The second distinction FDEP identified as sufficient to narrow the applicability of *NAHB* is based on one of the few enumerated criteria that is not common to both Section 402 and 404. The enumerated criteria that FDEP identifies is in Section 404(h)(1), which requires EPA to determine whether the state has authority:

> [t]o issue permits which, . . . apply, and assure compliance with, any applicable requirement of this section, including, but not limited to, the guidelines established under section (b)(1) of this section . . . .

FDEP then noted that the CWA Section 404(b)(1) Guidelines that were referenced in the criteria enumerated at Section 404(h)(1) contain a single sentence providing that:

> No discharge of dredged or fill material shall be permitted if it . . . [j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of [critical] habitat.[42]

FDEP then read the *regulatory* provision promulgated by EPA into the *statutory* criteria enacted by Congress and concluded that Congress must have intended that EPA's approvals under Section 404 would not be mandatory like they are in Section 402, but entirely at the discretion of the Agency. More specifically, FDEP believes these two provisions (one statutory and one regulatory) operate together to unburden EPA of its mandatory obligation to transfer permitting authority once a state or tribe demonstrates that it has the legal authorities identified in the enumerated criteria. According to FDEP, EPA has wide discretion to decline to transfer Section 404 permitting authority to a state or tribe if the Agency believes it may adversely impact listed species.

FDEP's extended chain of reasoning does not hold up. For one, FDEP once again ignores the limited role that Congress provided EPA in approving the transfer of CWA permitting authority. Section 404(h)(1) requires EPA to confirm *that a state or tribe has authority* to enforce the Section 404(b)(1) Guidelines, including those related to the ESA – it does not give *EPA* authority to weigh those guidelines in deciding whether or not to transfer permitting authority. Once the Agency determines that a state or tribe has the requisite authority in place, EPA's inquiry is over and the Agency must effectuate the transfer of authority.

Notably, the Supreme Court considered (and rejected) a nearly identical argument in *NAHB*, reasoning that none of the criteria made the protection of endangered species "an end in itself."[43]

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[42] 40 CFR 230.10(b)(3).

[43] *NAHB*, 551 U.S. at 671

So too did the Sixth Circuit in its recent decision applying the *NAHB* decision in the context of a CWA Section 311 approval.[44] FDEP's argument fails for the same reason here. Section 404 of the CWA does not allow EPA deny the transfer of permitting authority for "any reason under the sun."[45] "Rather, the Act requires the agency to approve any plan that satisfies the enumerated criteria."[46]

FDEP's argument fails for an additional reason as well. The only references to endangered or threatened species that FDEP can identify come from EPA's regulatory guidelines – not Section 404. Like Section 402, Section 404 is completely devoid of any reference to the ESA, endangered or threatened species, or critical habitat. FDEP's suggestion that a single sentence in the regulatory guidelines referenced in Section 404(b)(1) reflects Congress's intent to entirely transforms EPA's role under Section 404(h) runs up against the principle that Congress doesn't hide regulatory elephants in mouseholes.[47] "And mouseholes don't get much smaller than this."[48]

As such, EPA's 2010 response to ECOS and ASWM continues to ring true:

> While there are some differences between §402(b) and §404(h), these differences do not transform EPA's action approving a state 404 program into a "discretionary federal action." Therefore, EPA believes that its action to transfer §404 permitting authority is not a discretionary federal action and thus the Agency need not engage in a §7(a) (2) ESA consultation.[49]

IV. FDEP'S WHITEPAPER REFLECTS THAT THERE ARE SIGNIFICANT ISSUES WITH THE SERVICE'S PROCESS FOR APPROVING HABITAT CONSERVATION PLANS UNDER ESA SECTION 10

FDEP has requested that EPA take the position that transfers of permitting authority under CWA Section 404 are discretionary actions subject to Section 7 consultation requirements, because the state wants to avail itself of the incidental take protections that Section 7 provides. FDEP asserts that, if EPA were to initiate Section 7 consultation and adopt any "reasonable and prudent alternatives" recommended by the Services within the Agency's ultimate decision to transfer Section 404 permitting authority, then the state and holders of state-issued permits will become protected from any criminal or civil liability for incidental take of listed species through issuance of an Incidental Take Statement ("ITS").

While FDEP is correct that ESA Section 7 provides a mechanism for issuance of an ITS, it is not the only means the ESA provides for obtaining protection from incidental take liability. There are far more appropriate means of ensuring that Florida's assumption of CWA Section 404 permitting authority is protected from incidental take liability. In particular, Congress in 1982 amended the ESA to provide a mechanism through which parties obtain from the Services an

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[44] *Nat'l Wildlife Fed. v. Dep't of Trans*, Slip Op. at Nos. 19-1609/1610 (6th Cir. June 5, 2020).
[45] *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1298 (11th Cir. 2019).
[46] *Nat'l Wildlife Fed. v. Dep't of Trans*, Slip Op. at Nos. 19-1609/1610 (6th Cir. June 5, 2020).
[47] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).
[48] *Nat'l Wildlife Fed. v. Dep't of Trans*, Slip Op. at Nos. 19-1609/1610 (6th Cir. June 5, 2020).
[49] See EPA's December 27, 2010 letter to ECOS and ASWM (Docket ID No. EPA-HQ-OW-2020-0008).

Incidental Take Permit ("ITP") that protects them from liability for potential take of listed species "if such taking is incidental to, and not the purpose of, the carrying out of the otherwise lawful activity."[50] This ITP protection under ESA Section 10 clearly is the proper mechanism to address the potential incidental take liability concerns that may arise if Florida were to assume the Section 404 program, because Congress crafted ESA Section 10 to afford protections to parties just like the state of Florida.

If Florida successfully assumed the Section 404 program, it would have authority to issue permits allowing the discharge of dredged and fill material in certain navigable waters. The purpose of those permits would be to authorize activities necessary for important development or infrastructure projects, and to do so in a way that is regulated and protective. While there is some likelihood that listed species can be taken in the course of the permitted dredge and fill activities, those takes would be "incidental to, and not the purpose of," the permit issuance or the activity authorized by the permit. ESA Section 10 is designed to provide incidental take liability protections in such circumstances.

Notwithstanding the suitability of ESA Section 10 to address FDEP's stated concerns, there are plenty of regulatory hurdles that must be overcome before the Services will issue an ITP. For one, Florida must develop, and the Services must approve, one or more Habitat Conservation Plans ("HCPs"). "HCPs are planning documents required as part of an application for an incidental take permit. They describe the anticipated effects of the proposed taking; how those impacts will be minimized or mitigated; and how the HCP is to be funded."[51] More specifically, under ESA Section 10, the various FWS regulations, and guidance developed thereunder, HCPs must include:

- An assessment of impacts likely to result from the proposed taking of one or more federally listed species;
- Measures that the permit applicant will undertake to monitor, minimize, and mitigate such impacts, the funding available to implement such measures, and the procedures to deal with unforeseen or extraordinary circumstances;
- Alternative actions to the taking that the applicant analyzed, and the reasons why the applicant did not adopt such alternatives; and,
- Additional measures that the FWS may require.

HCPs are also required to comply with the "Five Points Policy" by including:

1. Biological goals and objectives, which define the expected biological outcome for each species covered by the HCP;

2. Adaptive management, which includes methods for addressing uncertainty and also monitoring and feedback to biological goals and objectives;

3. Monitoring for compliance, effectiveness, and effects;

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[50] ESA Section 10(a)(1)(B).

[51] https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf (visited June 24, 2020).

4. Permit duration which is determined by the time-span of the project and designed to provide the time needed to achieve biological goals and address biological uncertainty; and

5. Public participation according to the NEPA.[52]

Before the Services can rely on an applicant's HCP to issue an ITP, they must confirm compliance with the information requirements outlined above and determine that the HCP satisfies a number of additional criteria specifically laid out in ESA Section 10, including determinations that:

(i) Taking will be incidental;

(ii) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking;

(iii) The applicant will ensure that adequate funding for the plan will be provided;

(iv) Taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) Other measures, as required by the Secretary, will be met.[53]

As is likely evident from the lengthy submittal requirements and detailed review described above, HCPs are costly to develop and implement—particularly so when they are designed to cover a broad geographic range or multiple species.

In addition to cost issues, widespread reliance on HCPs has been hampered by the time frequently required for the development and subsequent approval of HCPs. While the Service's HCP Handbook states that even the most complex HCP should be approved in less than 10 months,[54] API members' experiences reflect far longer approval and development timeframes. In comments responding to the advance notice that preceded this proposed rule, the National Association of Homebuilders provided an analysis that the approval process for HCPs takes, on average, 1.76 years (642 days) regardless of the geographic scope or number of species.[55] Some more complex HCPs have lingered for several years without approval. Moreover, these time periods relate only to the HCP approval process – not the years of effort required to develop an HCP.

FDEP is undoubtedly aware the HCP program is beset with long delays, excessive costs, and profound uncertainty. And FDEP is likely correct to assume that it would be far too costly and time-consuming to pursue the development and approval of one or more HCPs that could cover the geographic scope of the waters for which FDEP would be the Section 404 permitting

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[52] https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf (visited June 24, 2020).
[53] ESA Sec. 10(a)(2)(B).
[54] 14 FWS, 1996. FWS HCP Handbook. http://www.fws.gov/midwest/endangered/permits/hcp/hcphandbook.html Chapter 1:1-14. (visited June 24, 2020).
[55] See NAHB comment at http://www.regulations.gov/#!documentDetail;D=FWS-R9-ES-2011-0099-0067 (visited June 24, 2020).

authority and the 135 endangered or threatened species that may be found in or near those waters. While we recognize that FDEP has real and credible concerns about the viability of using one or more HCPs to obtain protection from incidental take liability, these concerns do not provide EPA any basis to now view as discretionary the transfers of permitting authority that the Supreme Court identified as mandatory. Nor do FDEP's views about the relative expediency of obtaining incidental take protection through an ITS justify the imposition of Section 7 consultation obligations where none exist.

FDEP's concerns about the absence of viable options to timely obtain incidental take liability protection may be genuine, but these are not concerns that EPA can, or should, address by attempting to change the mandates that the CWA imposes on the Agency. Congress provided ESA Section 10 as the mechanism that entities like FDEP should use to protect themselves from liability for take of listed species when "such taking is incidental to, and not the purpose of, . . . an otherwise lawful activity."[56] To the extent that FWS has failed to implement ESA Section 10 in a manner that makes development of HCPs a viable option for entities like FDEP, it is the Service, and not EPA, that should consider changing its approach. API has, in fact, previously called on the FWS to address the routine delays in the HCP approval process by mandating adherence to approval deadlines, and devoting the funds and technical assistance necessary to meet those mandates.[57] API continues to believe that the HCP process must be reformed—and would likely support Florida, were the state to work with FWS to allow for the streamlined development and approval of an HCP protecting Florida's putative Section 404 permitting program and all future holders of state-issued Section 404 permits from incidental take liability. API cannot support the FDEP Whitepaper's proposal to address these concerns by amending EPA's Section 404 obligations, such that they conflict with the Supreme Court's holding in *NAHB*, depart from the text and structure of the CWA, and upend longstanding Agency practice.

IV. CONCLUSION

API appreciates the opportunity to provide these comments. As noted throughout, while we support cooperative federalism and efforts to increase state and tribal assumption of the CWA Section 404 program, we do not support the approach recommended in the FDEP Whitepaper.

If you have any questions or need additional information, please feel free to contact me at wagner@api.com or 202-682-8529.

Sincerely,

/s/ John Wagner
John Wagner

[56] ESA Sec. 10(a)(2)(B).
[57] *See, e.g,* API comments in Docket No. FWS–R9–ES–2011–0099.